

Polish Judiciary and Constitutional Fidelity: beyond the institutional “Great Yes”?

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We, the Polish Nation – all citizens of the Republic,

Both those who believe in God as the source of truth, justice, good and beauty,

As well as those not sharing such faith but respecting those universal values as arising from other sources

Equal in rights and obligations towards the common good – Poland [...]

Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage [...]

Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities

We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.

Preamble to the Polish Constitution of 1997 (excerpts)

Institutional critical juncture and ...

As the Polish government continues to refuse the publication of the judgments of the Constitutional Court (as of writing 10 judgments have not been published, most of these dealing with the fundamental rights of citizens), the issue of legal consequences of a judgment delivered, but unpublished, comes to the fore.

On 26th of April, 2016 the General Assembly of the Polish Supreme Court composed of 85 judges of the Supreme Court and acting to ensure the uniformity of the case law of ordinary and military courts, [adopted the following resolution](#): “in accordance with the article 190 paragraph 2 of the Constitution, judgments of the Constitutional Court shall be immediately published. Unpublished judgment of the Constitutional Court that declare the specified provision to be unconstitutional repeals the presumption of constitutionality on the moment it is pronounced by the Court in the proceedings”.

This resolution was adopted on the basis of art. 16 paragraph 1 point 6 of the Statute of 23rd of November 2002 on the Supreme Court which lists the competences of the General Assembly of the Judges of the Supreme Court. Point 6 lists the Court's competence to “adopt resolutions in matters important to the functioning of the Court”.

The resolution met with the usual ridicule and disdain from the ruling majority. The speaker for the Law and Justice party referred to the General Assembly as the “group of buddies preserving the status quo of the old regime”.

In response to this statement, [Supreme Administrative Court](#) decided to speak up, too. The College of the Supreme Administrative Court adopted its own resolution on 27th of April, 2016. The College criticized as inadmissible and outrageous statements by politicians which refer to the General Assembly of the Supreme Court as a „group of buddies,. Preamble to the Polish Constitution and its art. 10 state that the system of government of the Republic of Poland is based in the separation and equilibrium of powers between the legislative, executive and judiciary. Having recalled art. 8 of the Constitution (constitution is the supreme law of

the land and is granted direct application), the College called for a respect of the judicial independence in a democratic state ruled by law in which courts and tribunals are separate and independent from other branches of the government and are called on to safeguard the rights and freedoms of the citizens. Judges are subject to the Constitution and statutes only. Supreme Administrative Court reminded that on many occasions Polish administrative courts have approvingly referred to the rich case law of the Constitutional Court. The case law of the administrative courts always accepted the binding and final character of the rulings of the Constitutional Court (art. 190 paragraph 1 of the Constitution). The statute declared unconstitutional was treated as deprived of the presumption of constitutionality and, as a result, courts refused to apply it. At the same time, the College pointed out that the rulings of the Constitutional Court are to be promulgated immediately in the official journal in which the act was initially published (art. 190 paragraph 2 of the Constitution).

Institutional “Great Yes”

Not only humans have their own moments of truth. Institutions do too, and the choices they make at these moments of critical juncture weigh heavily on the legacy of an institution. The poem by C. Cavafis, *Che fece ... il Gran Rifiuto* (translated by [Edmund Keeley](#)) is important here.

*For some people the day comes
when they have to declare the great Yes
or the great No. It's clear at once who has the Yes
ready within him; and saying it,
he goes from honor to honor, strong in his conviction.
He who refuses does not repent. Asked again,
he'd still say no. Yet that no—the right no—
drags him down all his life.*

We must never forget, though, that courts (judges), are not alone. Lawyers and the legal community should always lurk in the background. When two Polish Supreme Courts finally broke their silence, they aligned themselves with other legal professions that have been voicing their concerns over the dismantling of the rule of law and undermining the authority of the Constitution. Taken together, we witness the emergence of the legal complex in Poland. Legal complex stands for a coalition of legal occupations that come together to embed, enable, draft, litigate, implement, oppose, critique, and ally with judges and courts^[1]. When the Polish rule of law as we know is crumbling down, there are no comfort zones for lawyers and usual fence-sitting. It is the time of mobilization, speaking in one voice. However, as consequential as this process is, it is not enough to deliver goods in Poland today. Much more is needed: constitutional fidelity which transcends lawyers' heads and touches people's hearts.

The Courts have spoken, but how and why does it matter?

Constitutional fidelity is more than a duty and an obligation to observe the text. It should be construed as much more. I agree with J. Balkin that

“Fidelity is not simply a matter of correspondence between an idea and a text, or a set of correct procedures for interpretation. It is not simply a matter of proper translation or proper synthesis or even proper political philosophy. Fidelity is not a relationship between a thing and an interpretation of that thing. Fidelity is not about texts; it is about selves. Fidelity is an orientation of a self towards something else, a relation- ship which is mediated through and often disguised by talk of texts, translations, correspondences and political philosophy. Fidelity is an attitude that we

have towards something we attempt to understand; it is a discipline of self that is related to the discipline of a larger set of selves in a society. Fidelity is ontological and existential; it shapes us, affects us, has power over us, ennobles us, enslaves us. Fidelity is a form of power exercised over the self by the self and by the social forces that help make the self what it is. As such, fidelity is an equivocal concept, full of both good and bad, mixed inextricably together. Fidelity is the home of commitment, sacrifice, self-identification and patriotism, as well as the home of legitimization, servitude, self-deception and idolatry”[2].

This raises important questions for my own understanding of fidelity to the Polish Constitution and the reading of the above resolutions. Fidelity must not be simply a matter of text and following the letter of the law. Being faithful to the document and the institutions it creates is more a state of mind, not mere practice. As such constitutional fidelity has a lot in common with constitutionalism which is not only about the document, but rather about the state of mind, limited government and culture of restraint.

Fidelity can refer to the original meaning of the constitutional document or to its fundamental core or to the text as such, speak to the principles and concepts that are embedded in the Polish constitutional structure and tradition, principles that make up our constitutional identity. Fidelity and its object thus have the potential of explicating who we were, where we came from and where we are headed and finally, strives to grasp in the possible way, who we are today. Each constitutional document has its past, present and future and these three temporal dimensions are linked by the rationale of the underlying principles of values. Principles and values that make up the constitutional identity must be interpreted so as to ensure both the continuity of the messages contained therein and their durability. What is needed is the compromise and equilibrium between necessary change that embraces *The New* and the stability that caters to *The Tradition*. The latter enables us to move forward and set our gaze on the future while not forgetting about the past and about the places we come from. In other words constitutional interpretation must be conservative (preserving the values) and reformative (reading these in the light of ever-changing circumstances). Future emerges at the intersection of both dimensions: looking back and staying in the present. Again as argued by Balkin:

“Fidelity is a sort of servitude, a servitude that we gladly enter into in order to understand the Constitution. To become the faithful servants of the Constitution we must talk and think in terms of it; we must think constitutional thoughts, we must speak a constitutional language. The Constitution becomes the focus of our attention, the prism of our perspective. Our efforts are directed to understanding it-and many other things in society as well-in terms of its clauses, its concepts, its traditions. Through this discipline, this focus, we achieve a sort of tunnel vision: a closing off to other possibilities that would speak in a different language and think in a different way, a closing off to worlds in which the Constitution is only one document among many, worlds in which the Constitution is no great thing, but only a first draft of something much greater and more noble. And to think and talk, and focus our attention on the Constitution, to be faithful to it, and not to some other thing, we must bolt the doors, shut out the lights, block the entrances. Fidelity is servitude indeed. But this servitude is not so much something the Constitution does to us as something we do to ourselves in order to be faithful to it“.

Such understanding of fidelity underscores the aspirational function of the constitutional document. It aspires to reflect “us” in the best, and not perfect, way. It aspires to capture this reflection, and yet it will never achieve this goal in a definite and final way, since “we” change and evolve along with the document. Preamble to the Polish Constitution shows the commitment to which Polish nation aspires, commitments that are anchored in the past, developed and refined in the present and carried over into the future. It means that the Constitution’s commitments have not been yet met. This never-ending meandering between the past and the backward-looking and the future with its forward-looking is a matter of constitutional reflection and politics. Such pacting must be undertaken by each generation which has its own distinctive role to play in spelling out what the constitutional pact mandates today. Constitutional fidelity underpins this process and arises at the interstices of practice, text,

interpretation and culture.

The fact that the promise of the Constitution was not fully realized (argument often repeated by the new Polish majority in favour of rejecting the Constitution) must not detract from our Fidelity. Quite to the contrary. It should fuel it and make us try even harder to make these commitments a reality. It is in this sense that the constitutional fidelity is about generational reading of the document. It is not about uncritical iconoclasm. It is about pragmatic recognition that our constitutional allegiances are shaped, reshaped, reexamined as we move forward and as the world around the constitution changes and fluctuates. There is no place for fear of failure, because failure is the part of the fidelity as no Constitution is perfect. Fidelity is about the journey and the process, rather than a boat and final destination. Past must be the key to the future, but not only. After all, constitutions that are meant to last must be understood as documents made for people of fundamentally different views, as Justice Oliver Wendell Holmes rightfully said. Again American constitutional tradition of looking to the past in a constructive way might be used here:

“We turn to the past not because the past contains within it all of the answers to our questions, but because it is the repository of our common struggles and common commitments; it offers us invaluable resources as we debate the most important questions of political life, which cannot fully and finally be settled”^[3].

Each generation should build on the best of the past and move forward with this baggage. After all, this is exactly what the Preamble to the Polish Constitution mandates. This is the kind of fidelity I am talking about and the one that should inform the understanding of the constitutional commitments the judges should owe to the Constitution of 1997.

Polish judges, the Constitution and the weight of the past

All this takes on special importance today when the Constitution is under systemic attack and flouting. The resolutions above offer promising vistas moving forward but right now they are just this: non-binding acts of two Polish Supreme Courts sending important messages on their respective position in the constitutional crisis that has been engulfing Poland for the last 6 months. How these resolutions will translate into the daily practice of lower courts is altogether a different question. Given the historic baggage of Polish judges and their limited understanding of judicial function, the positive reception of the resolutions at the “bottom” of the judicial ladder must not be taken for granted. [The weight of the past and old habits](#) might obviate the embrace by the ordinary judges of the resolutions of the supreme courts. The minds of Polish judges continue to be hostage to the belief that the Constitution is a purely declaratory document with no normative content and no role to play in the judicial resolution of disputes. As a result, constitutional document is often relegated to the margins of the judicial practice. All this clouds the positive reception of the above resolutions with the uncertainty. After all, the common thread that runs through the resolutions is making the Constitution supreme law of the land and part and parcel of the *daily* decision-making process of a lower judge. Supreme Courts have clearly laid down the route to follow. Now, the time for real actions on the ground has arrived. However, at this point, the fidelity of an average judge to the Constitution remains simply unknown.

Constitutional Fidelity and going beyond lawyers’ heads

“To have faith in the Constitution is to have faith in an ongoing set of institutions whose meaning the individual will not be able to control. Most of us participate only in the great mass of public opinion that eventually affects the meaning and direction of the Constitution; our views are like a drop of water in a great ocean. We cannot mold the object of our faith to our will [...]”.

As important as institutions are, engaged citizenry has its own fidelity and commitments to live up to. Our fidelity

is at its best when people (not only lawyers!) see themselves as being part of the process that the constitution embodies *from* nation – building *through* nation- discovery *to* nation-sustaining and growth. Fidelity is not about logic, but first of all about sense of belonging, emotions, tradition and history. Only combination of these factors is able to define the contours, and, finally, durability of, our fidelity to, the Constitution.

That is why the statements by the supreme courts must be read in the light of more general trend of professing the allegiance to the Constitution and to the Constitutional Court by various quarters of Polish society. “The great mass of public opinion” not only affects the meaning and direction of the Polish Constitution, but also impacts its very survival. Recent weeks saw [the biggest mass protests](#) post-1989. In Warsaw 250,000 people were out in the streets and made their voice heard against hijacking of the last 25 years of Polish history. This political mobilization of Polish society must be seen as a reminder of 500-year long Polish history to which the Preamble proudly refers. Our fidelity to the Constitution should be an expression of loyalty to the great moments of our history and the past that is marked by plurality of voices and respect for the Other in the best Polish tradition of openness and tolerance. 1997 Constitution is only part of this tradition. Rule of law, democracy, freedoms and rights, functioning system of judicial protection, constitutional court with a strong record of human rights protection and rule of law, all are built on the tradition of limited government, separation of powers, centrality of the individual and the respect for the self-imposed rules that had been a staple of Polish constitutional narrative and on which Polish Constitution now builds.

Taken together, the statements from Poland’s highest courts and the societal mobilization are first symptoms of a constitutional fidelity in the making. As we continue to discover our fidelity on the fly, present generation of Poles has a special responsibility to balance the past and the future against the present dangers to the very survival of Our Constitutional document that was adopted in 1997 by far greater majority than the one that voted for the current majority in 2015. Make no mistake. Polish democracy and the rule of law A. D. 2016 will not be saved by the European Commission enforcing European values against yet another recalcitrant Government or by lawyers, no matter how many, coming together. The rescue package must come from within or, in other words, from the popular “Great Yes” as the expression of *Our Constitutional Fidelity*.

[1] T. C. Haliday, *Why the Legal Complex is Integral to Theories of Consequential Courts*, in D. Kapiszewski, G. Silverstein, R. A. Kagan, (eds.), *Consequential Courts. Judicial roles in Global Perspective*, (2013), p. 337, 339.

[2] *Agreements with hell and other objects of our faith*, (1997) 65 Fordham Law Review 1703.

[3] J. M. Balkin, R. B. Siegel, *Introduction*, in *The Constitution in 2020*, (2009), p. 4.

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SUGGESTED CITATION Koncewicz, Tomasz Tadeusz: *Polish Judiciary and Constitutional Fidelity: beyond the institutional “Great Yes”?*, *VerfBlog*, 2016/6/12, <http://verfassungsblog.de/polish-judiciary-and-constitutional-fidelity-beyond-the-institutional-great-yes/>.